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In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN RUMPF, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 576 F. 2d 818.

JURISDICTION

The opinion of the court of appeals (Pet. App.) was entered on May 4, 1978. A timely petition for rehearing was denied on June 8, 1978. Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including August 7, 1978, and the petition was filed on July 17, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether *Abney* v. *United States*, 431 U.S. 651, which was decided while this case was pending on appeal, requires that petitioners' convictions be reversed because they sought to appeal from the court's order denying their motion to dismiss the indictment on double jeopardy grounds.

2. Whether petitioners' second trial was barred by the Double Jeopardy Clause.

3. Whether marijuana seized near petitioner Hanson's rented ranch house should have been suppressed on the ground that it was seized in violation of the Fourth Amendment.

STATEMENT

After a jury trial in the United States District Court for the District of New Mexico, petitioners Rumpf, Hanson, and Masters were convicted of possessing more than 1,900 pounds of marijuana with intent to distribute it and of conspiring to commit that offense, in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner Griffin was convicted only on the conspiracy charge (Pet. App. 8a). Masters and Hanson were sentenced to concurrent terms of four years' imprisonment on each count, to be followed by a special parole term of four years. Rumpf was sentenced to one year's imprisonment on the possession count, to be followed by two years' special parole, and to five years' probation on the conspiracy count. Griffin was sentenced to four years' imprisonment on the conspiracy count, to be followed by a four-year term of special parole. The court of appeals affirmed, one judge dissenting (Pet. App.; Br. 3).

1. Early on the morning of April 20, 1976, Drug Enforcement Administration agents received a tip from a reliable source that a shipment of marijuana would be arriving that evening on State Road 117 near Grants, New Mexico, by air from Mexico (H. 27; Tr. 229, 319-320).[1] The agents then began surveillance of State Road 117, which is frequently used as a landing area for aircraft smuggling drugs into this country from Mexico (H. 27, 65; Tr. 323). That afternoon, the agents observed petitioner Rumpf enter State Road 117 in a green Chevrolet, which they recognized as having been involved in prior drug smuggling ventures (H. 28; Tr. 231). Another group of agents saw a blue Ford pick-up truck, pulling a Starcraft collapsible camper trailer, enter the same road. The blue pick-up truck was also known to have been involved in airborne smuggling activities in the past (Tr. 429, 532–533, 562–563).

Both vehicles remained on the road all night (H. 29, 82; Tr. 233). At 7:00 the following morning the green Chevrolet pulled out from State Road 117 and turned east on Interstate 40. One group of agents followed it (H. 29–30, 82; Tr. 233–234). Five minutes later, the blue pick-up truck, which was being driven by petitioner Masters, appeared and proceeded in the same direction (H. 30; Tr. 349–350, 430). The camper trailer attached to the pick-up truck now appeared to

[1] "H." refers to the hearing on petitioners' motion to suppress.

be heavily loaded, as it was swaying badly on the road (H. 30, 65–69).

At 9:00 A.M., the two vehicles arrived at a ranch house rented by petitioner Hanson. When the first pair of agents arrived at the ranch house shortly thereafter, one of them walked towards a shed some distance from the house, where Rumpf was standing next to the camper trailer. The camper trailer was still attached to the blue pick-up truck. As he approached, the agent saw several large cardboard boxes and plastic garbage bags filled with bricks of marijuana in plain view in the open shed. The marijuana was exposed in some of the packages. The agent also smelled a strong odor of marijuana emanating from the camper trailer. He placed Rumpf under arrest and searched the camper trailer, finding more than 1,900 pounds of marijuana inside it (H. 66, 69, 74–79, 83–85; Tr. 255–256, 354–374, 416–417, 435).

When the second pair of agents arrived at the ranch house, they saw Hanson and Masters hurrying out the front door of the house, apparently preparing to drive off. The agents approached them and placed them under arrest (H. 30–31; Tr. 239, 276–277). Two of the agents were then sent to obtain a search warrant for the house (H. 32), and the other agents remained on the premises until a search warrant was obtained authorizing them to seize the marijuana and search the house (Tr. 449–454, 246–250, 549–550). Meanwhile, at 4:30 P.M., petitioner Griffin arrived at the ranch and asked for Hanson. When told that she was not there, Griffin volunteered that the trailers were his. He was then arrested (H. 32–35, 86–88; Tr. 472).

2. Trial began on the morning of July 12, 1976. In his opening statement to the jury, the prosecutor referred to the physical evidence discovered by investigators during their searches of the ranch house and shed. In the course of that discussion, he mentioned that two syringes had been found in petitioner Hanson's house (Tr. 177). After the prosecutor completed his opening statement, all of the attorneys approached the bench and counsel for petitioner Hanson moved for a mistrial, alleging that prior to trial the prosecutor had assured defense counsel that he would not refer to the syringes (Tr. 183). The prosecutor explained (Tr. 184):

> Your Honor, I told them I wasn't going to introduce the syringes at trial, which I'm not going to. I didn't say that I wouldn't comment on them. And I didn't say that the Agents woudn't testify that they were found at the farm house.

The court then granted the mistrial motion. Counsel for petitioners Rumpf, Masters, and Griffin, who were present throughout the bench conference, did not object to the mistrial or otherwise indicate their desire to proceed with the jury that had been selected. The court then dismissed the jury and recessed until the afternoon (Tr. 184).

When the court reconvened, counsel for each of the petitioners moved to dismiss the indictment on the ground that retrial was barred by the Double Jeopardy Clause. The motion was denied, and counsel for petitioner Hanson requested permission to file an oral notice of appeal, which was granted (Tr. 188). Counsel for the other petitioners then "request[ed] an interlocutory appeal," which the court denied (Tr.

191). A jury was selected and sworn, and the second trial commenced without further objection by petitioners (Tr. 191–212).

ARGUMENT

1. On June 9, 1977, while this case was pending on appeal from the convictions, this Court held in *Abney* v. *United States*, 431 U.S. 651, 662, that "pretrial orders rejecting claims of former jeopardy * * * constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of § 1291." Accordingly, under *Abney* petitioners apparently would now be entitled to appeal from the district court's denial of their motion to dismiss the indictment and to forestall their second trial pending the disposition of that appeal. As the court of appeals held (Pet. App. 4a–5a), however, *Abney* does not require that petitioners' pre-*Abney* convictions in this case be nullified and that petitioners be retried.

First, the court of appeals properly held that the decision in *Abney* should not be given retroactive effect. In determining whether a newly announced rule of criminal procedure should be given retroactive application, this Court has applied a three-part test, looking to the purpose of the new rule, the extent of the reliance on the former rule, and the impact of retroactive application on the administration of justice. See *Robinson* v. *Neil*, 409 U.S. 505, 509; *Williams* v. *United States*, 401 U.S. 646, 652 n. 5. Under these criteria, the decision in *Abney* should not be applied retroactively.

The first factor requires that a new rule be given retroactive effect only in two situations; where the new decision has remedied an "aspect of the criminal trial that substantially impairs its truth-finding function" (*United States* v. *Peltier*, 422 U.S. 531, 535; *Williams* v. *United States*, *supra*, 401 U.S. at 653) or where the conduct at issue has been held to be "constitutionally immune from punishment" (*Robinson* v. *Neil*, *supra*, 409 U.S. at 509). Plainly, neither situation is involved in the interlocutory appeal ability of orders denying motions to dismiss on double jeopardy grounds.

The second factor similarly cuts against giving retroactive application to *Abney*. At the time of petitioners' trial, the law was unsettled on the question of the appealability of orders denying motions to dismiss on double jeopardy grounds.[2] Since the Tenth Circuit had not yet ruled on the question, the district court was not acting in contravention of controlling case law or even a strong contrary trend when it proceeded with petitioner's retrial after granting a mistrial at a very early stage in the first trial.

As to the third factor, if *Abney* were made fully retroactive, the effect on the administration of justice would be adverse. Convictions untainted by error would be set aside even though the double jeopardy claim sought to be appealed had subsequently been

[2] Several circuits permitted an interlocutory appeal (*United States* v. *Barket*, 530 F. 2d 181 (C.A. 8), certiorari denied, 429 U.S. 917; *United States* v. *Beckerman*, 516 F. 2d 905 (C.A. 2); *United States* v. *Lansdown*, 460 F. 2d 164 (C.A. 4)), while others refused it (*United States* v. *Young*, 544 F. 2d 415 (C.A. 9); *United States* v. *Bailey*, 512 F. 2d 833 (C.A. 5)).

determined to be without merit. "Wholesale invalidation of convictions rendered years ago could well mean that convicted persons would be freed without retrial, for witnesses * * * no longer may be readily available, memories may have faded, records may be incomplete or missing, and physical evidence may have disappeared." *Gosa* v. *Mayden*, 413 U.S. 665, 685 (plurality opinion).

Moreover, the purpose of permitting an interlocutory appeal when double jeopardy claims are raised is to prevent the government from haling a defendant into court when the defendant should be free from the aggravation and expense of a second trial. Yet in a case such as this one, where it has ultimately been determined that the second trial was not barred by the Double Jeopardy Clause, petitioners have suffered no prejudice from being denied their interlocutory appeal. Since the court of appeals held that their double jeopardy claim is invalid, they are in the same position now that they would have been in had they pursued their interlocutory appeal to judgment in the court of appeals. Double jeopardy interests would hardly be served by requiring another trial of petitioners under these circumstances.

Finally, we note that petitioners did nothing beyond filing an oral notice of appeal to protect their rights to an interlocutory appeal.[3] They did not seek relief from the court of appeals to prevent the hold-

[3] Indeed, only petitioner Hanson filed an oral notice of appeal. The other petitioners "request[ed] an interlocutory appeal," which the district court denied (Tr. 191).

ing of a second trial,[4] nor did they otherwise pursue the matter with the district court after initially making their motion for dismissal of the indictment and obtaining rulings on their requests to appeal. Compare *United States* v. *Cruz*, 568 F. 2d 781 (C.A. 1).

Petitioners contend that all that was required of them was to file notice of appeal; at that point, they argue, the district court was deprived of jurisdiction to proceed further with the case, and any action by the district court after that time was "a nullity" (Pet. 6). In fact, however, the mere filing of a notice of appeal does not divest the district court of jurisdiction to proceed with the case if the order appealed from does not finally dispose of the entire action, or if the appealability of the order is questionable. See 9 Moore, *Federal Practice*, pp. 737–740 (2d ed. 1975). Where the district court determines to proceed with the case in the belief that the order in question is not appealable, the would-be appellant's proper course to protect its appeal right is to seek mandamus or prohibition from the court of appeals. *Arthur Anderson & Co.* v. *Finesilver*, 546 F. 2d 338 (C.A. 10); *Ruby* v. *Secretary of United States Navy*, 365 F. 2d 385 (C.A. 9). Since petitioners took no steps to protect their appeal rights following the mistrial declaration, the court of appeals properly held that the district court had jurisdiction to try them before a second jury.

[4] The trial took four days, during the course of which petitioners did not seek any form of relief from the court of appeals, either through a stay of proceedings in the district court or by way of a writ of mandamus or prohibition.

The decision below appears to conflict with the decision of the Ninth Circuit in *Moroyoqui* v. *United States,* 570 F. 2d 862, which petitioners do not cite. The Ninth Circuit in that case held that *Abney* should be applied to cases pending on direct review when *Abney* was decided, and therefore reversed a conviction entered upon a guilty plea after a pre-trial denial of a motion to dismiss on double jeopardy grounds. We believe that the court in *Moroyoqui* mistakenly relied on language in *Linkletter* v. *Walker,* 381 U.S. 618, 627, that "a change in law will be given effect while a case is on direct review." The *Linkletter* rule has been limited to its particular context, and subsequent retroactivity decisions have held that prospective rules are not to be applied to decisions on direct or collateral review at the time the new rule is adopted. See *Johnson* v. *New Jersey,* 384 U.S. 719, 732; *Williams* v. *United States,* 401 U.S. 646, 656. Moreover, we do not believe that this conflict requires the attention of this Court, since few if any other cases would be affected by the ruling. The number of cases raising the *Abney* issue that were on direct appeal when *Abney* was decided is quite limited, and, in any event, most criminal cases that were on direct appeal in June 1977 have by now become final.

2. On the merits, petitioners contend (Pet. 6–7) that their retrial was barred by the Double Jeopardy Clause. The court of appeals unanimously rejected this claim. As this Court has held, " 'where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier

to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.' " *United States* v. *Dinitz,* 424 U.S. 600, 607, quoting *United States* v. *Jorn,* 400 U.S. 470, 485. The court of appeals correctly found that the prosecutor did not act in bad faith or provoke the mistrial in order to obtain a more favorable forum. Instead, the court held (Pet. App. 7a):

> The record shows only a misunderstanding between defense counsel and the prosecution as to a conversation before trial as to whether the syringes would be commented on or testified to.

Petitioners Rumpf, Masters, and Griffin argue that they did not request or consent to the mistrial and that therefore they can only be retried if there was a "manifest necessity" to declare a mistrial as to them. *Arizona* v. *Washington,* 434 U.S. 497, 505. But these petitioners had the opportunity to explain to the court that they did not wish to join in Hanson's mistrial motion but instead wished to continue the trial before the jury then impaneled. Rather than doing so, they watched silently while Hanson's counsel argued the mistrial motion, creating the impression with the court that Hanson's attorney was speaking for all the defendants. Having failed to object to the mistrial, petitioners have waived their right to have the mistrial judged under the "manifest necessity" standard. *United States* v. *Romano,* 482 F. 2d 1183, 1187–1188 (C.A. 5), certiorari denied *sub nom. Yassen* v. *United States,* 414 U.S. 1129; *United States* v. *Goldstein,* 479 F. 2d 1061, 1067 (C.A. 2), certiorari denied, 414 U.S.

873; *Roberts* v. *United States*, 477 F. 2d 544 (C.A. 8); cf. *United States* v. *Gentile*, 530 F. 2d 461 (C.A. 2), certiorari denied, 426 U.S. 936.

3. The court of appeals correctly held that there were both probable cause and exigent circumstances justifying the warrantless search of the camper trailer.[5] The DEA agents were informed that there would be a delivery of marijuana by airplane on State Road 117 on the night of June 20, 1976. They saw two vehicles enter State Road 117 on June 20, both of which they recognized as having been involved in previous airborne smuggling schemes. The next morning both vehicles left highway 117, one of them pulling a trailer that appeared to be fully loaded. When the agents arrived at the ranch house, one agent approached the shed where the truck and trailer had been parked. There he saw exposed marijuana in plain view. Approaching the camper, the agent smelled a strong odor of marijuana coming from inside it. Up to that point, no search had occurred. The DEA agents were simply investigating what they had reasonable cause to believe was a marijuana smuggling operation in progress. When the agent spotted marijuana in plain view in the shed and smelled the odor of marijuana coming from the camper, he had ample probable cause to search the camper.

[5] Petitioner Griffin lacks standing to contest the search. He was not present at the time of the search and disclaims a possessory interest in either the premises or the goods. See *Jones* v. *United States*, 362 U.S. 257. Furthermore, he was charged only with conspiracy, which is not "* * * an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." *Brown* v. *United States*, 411 U.S. 223, 229.

Nor was the search of the camper invalid for being conducted without a warrant. The camper trailer, attached to the pick-up truck, had just arrived at the farm and was capable of being driven elsewhere in a matter of minutes. Even after Rumpf's arrest, the mobility of the camper remained a significant concern, since the agents knew Rumpf was working with a number of accomplices, any one of whom could remove the trailer if it were left untended. This Court has recognized that the mobility of an automobile justifies an exception to the warrant requirement where the vehicle is thought to contain contraband. *Chambers* v. *Maroney*, 399 U.S. 42, 52; *Carroll* v. *United States*, 267 U.S. 132.

This case is distinguishable from *Coolidge* v. *New Hampshire*, 403 U.S. 443, on which petitioners rely. In *Coolidge*, unlike the present case, Coolidge's car was not suspected to contain contraband, it was not an instrumentality of the crime, and there were no suspected confederates who could have moved it (403 U.S. at 462). Moreover, in *Coolidge* there was "not even the inconvenience of a special police detail to guard the immobilized automobile" (*ibid.*). In this case, the agents were dealing with a group of accomplices, the situation had not yet been stabilized at the time of the search, and the agents had probable cause to believe that the trailer contained contraband. Moreover, the agents were in an unfamiliar and remote area in which a search warrant could not readily be obtained. Indeed, once they had stabilized the situation shortly after 9 A.M., the agents sent two of their

number to obtain a search warrant for the house; the agents had to wait until approximately 8 or 9 P.M. that evening before the warrant could be obtained (H. 60). The search of the camper-trailer at the time of Rumpf's arrest thus did not violate the Fourth Amendment rights of any of the petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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